

the Art and Practice
OF THE
COURT
OF
COMMON-PLEAS;
At *Westminster*.

Heretofore Written by
THOMAS CORY, Esq;
- Late Chief Prothonotary thereof.

AND
Now continued, and fitted to the Practice
used at this day, with Additions by *W. B.*
a Clerk of the same Court.

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Cum Gratia & Privilegio Regie Majestatis.

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THE
COMMON-PLEAS
COURT
OF

THOMAS COY. ETC.

JUL 22 1926

AND

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THE



THE
Course and Practice
of the COURT of
COMMON PLEAS.

Concerning Prisoners.

IF a Prisoners Body with his
Causes be removed by
Habeas Corpus or Writ of
Priviledge, if the Prisoner be
there in person, he must under-
take in double the sum, and his
Bayl in the single sum. But if
B the

the Prisoner be not there in person, then the Bayl must be in the double sum.

If such a Prisoner when he comes in Court, or before the Judge, hath no Bayl, he is either to be committed to the *Fleet*, or remanded, but he cannot be committed to the *Fleet* unless there be some process of the *Common Pleas* returned, or unless he be brought to the Bar, and the Record of a Judgment or Utlary be brought in Court to charge the Prisoner with in Court: but now the Common Practice is upon removal of a Prisoner by *Habeas Corpus*, to seign a Writ of *Capias*, or Attach-

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tachment of priviledge to turn
the Prisoner over to the *Fleet*.

If a Prisoner be committed
to the Fleet *pro defectu Ma-
nucaptorum*, and lyes three
Terms there, and the Plaintiff
doth not in that time Declare
against him, then upon a com-
mon Appearance the Prisoner
is to be discharged out of Pri-
son; but if the Plaintiff offers
to declare, and the Prisoner
will not appear, then the Pri-
soner must remain still in Pri-
son, and the Plaintiff may sue
him to the Utlary notwithstan-
ding he is in Prison.

B 2

Of

Of Bayl.

IF the Bayl bring in the Principal at any time before a Plea pleaded to a *Scire facias versus Manucaptors*, or before Judgment by default, the Court hath used to receive the Principal in discharge of the Bayl; and if the Plaintiff will pray him in Execucion, he shall have him; if not, then the Principal shall be discharged, and the Plaintiff may take him in Execucion when he can Arrest him; or he may sue forth Execucion against his Lands and Goods: but antiently the Principal

cipal could not render his body in discharge of his Bayl after he was returned *Non est inventus* upon Record, upon the *Capias ad satisfaciendum*, but now the Court hath the middle way, which is, to receive the Principal upon the return of the first *Scire facias*, but not after that.

If the Defendant comes in by *Cepi corpus* returned in debt for twenty pounds or above, or in any Action upon the Case, or Trespass *ad dampnum vel valenciam viginti Librarum* or above; or if he be Utlawed in any of these Actions *ad dampnum vel valenciam viginti*
Li-

Librarum or more, and rever-
 seth the Utlary, the De-
 fendant in such a case ought
 to put in Special Bayl, but
 in all other cases (except in
 Writs of Priviledge at the
 Suit of an Officer). Defen-
 dants appearance shall be re-
 ceived without Special Bayl.
 But this course is now al-
 tered by the late Act of Par-
 liament; so that the Plaintiff
 cannot have special Bayl un-
 less it be in the Writ Debt
 twenty pounds or upwards;
 and in all other Actions, the
 true cause of Action must be
 set forth at large in the Writ
 whereupon the Defendant is
 Ar-

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Arrested, otherwise a common Appearance is sufficient.

In all Writs of Priviledge at the suit of an Officer of the Court, the Defendant, if he be Arrested, must put in special Bayl, although the debt or damages demanded, be under twenty pounds; and if an Officer or Attorney of the Court be sued, he ought to be sued by Bill at the first, and not by Original, and if he shall refuse to appear, he shall be forejudged the Court, and then he may be Arrested, and so is the common course, but it is reserved to the Plaintiffs choice, whether he will sue him by Bill

Bill or Writ; But if one
 priviledged person sue another,
 the Plaintiff may, and doth usu-
 ally Arrest the Defendant,
 whether he be of this, or any
 other of the Kings Courts at
Westminster, for that the first
 priviledge destroys the second.

*Concerning the Writ of Clausum
 Fregit, and special Writ, con-
 taining the declaration at large;
 and of Filing New Origi-
 nals.*

IF the Defendant formerly
 had been Arrested upon a
Clausum fregit, the Plaintiff
 might

might have declared in any personal Action thereupon, except in debt: But of late they have used, and do now use to declare in debt, upon suing forth a New Original in debt.

Of Imparlances.

IF the Defendant appears upon an Arrest by *Clausum fregit* (which is a general Writ, and may be said to be the Common Pleas *Latitat*) he must have an Imparlance of Course; but if the Writ where-
 C upon

upon he was arrested be special, according to the truth of the Action, and returnable the first or second return in any Term, so as a *Venire facias* may issue forth, there the Defendant ought to answer the first Term in all personal and mixt Actions; but in real Actions, the Defendant shall have one Impar lance of Course.

The reason why they have had Imparlances in all cases in the *Kings Bench* is, because the Defendant being arrested upon a general Writ, a *Latus* could not know the cause of Action until the Declaration.

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tion. And this reason holds in the *Common Pleas*, where the Defendant is arrested upon a general *Clausum fregit*: But in other Special Writs where the very Declaration is in the Writ, and the Defendant might when he is arrested see the Declaration, in the Writ, there he ought not imparle, but to answer the first Term, as well in the *Kings Bench* upon their new Writ of *Acceciambille*, as in the *Common Pleas* upon Special Writs.

C 2

Of

*Of signing and entring of
Judgements.*

BY the course of the Court, after the ordinary rules given in the Office be out, the Plaintiff may enter Judgment by *nichil dicit*, (if the Defendant doth not plead) and this is as well in Ejectment as in all other personal Actions, without moving of the Court. But of late it hath been used in *Quare Impedit*, and Ejectment, to move the Court before they enter Judgement, and so is the Common practice now used.

But

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But in all real Actions no Judgment is to be entred by *nichil dicit* without motion in Court; and there was formerly a rule made, that no Judgment by default should be entred in Ejectment, without moving the Court; which rule was afterwards altered by another, and then Judgment might have been entred by default upon a Rule entred by the Secondary, so as the Parish where the Lands lye were expressed in the Rule. But now Judgment cannot be had by default in Ejectment, unless upon motion in Court, and *Affidavit* thereupon made, that
the

the Tenant was actually served with a true copy of the Declaration, and that the contents thereof were read unto him; or he, or his Wife, or his Servant, were acquainted with the meaning thereof.

Of Appearances upon Exigents, Habeas Corpus, Pluries Capias, Distringas, &c.

IF the Defendant appears upon the *Exigent*, or upon the *Habeas Corpus*, *Pluries Capias*, or *Distress*, or upon Bayl put in upon a *Habeas Corpus*,
or

or upon an Utlary reversed,
then by the course of the Court
the Defendant must answer the
first Term, because he hath
stood out so many Proceſs:
and in such cases the Court
does not use to change the
Wifne.

*Of Attachments upon
Contempt.*

IF an Attachment be granted
upon a contempt sworn by
Affidavit (as it ought) and
the Defendant is Arrested
thereupon, and brought into
Court,

Court, he ought to be committed to the *Fleet*, and then to be examined upon Interrogatories: if he clear himself upon his Oath, he shall be discharged, and have his costs paid him by the Prosecutor. If guilty, he shall be fined; but in this case the Prosecutor shall not be admitted to prove the Defendant guilty, after he hath cleared himself upon his Oath. But the course now used in such cases, is, for the Defendant with Sureties, to enter into a Recognizance in Court for his appearance *de die in diem*, until he be discharged, and then to turn him over to the Secondary

dary to be examined upon his Oath upon Interrogatories, but for want of *Manuautores* to send him to the *Fleet*.

Of amending Entries, &c.

BY the course of this Court every Declaration and Plea ought to be entred upon Record, the same Term it is delivered or pleaded, and every Issue and Demurrer the same Terme it is joyned; and therefore if it be altered or amended before it be entred, he that altereth must pay costs, but if

D it

it be once entred upon Record, then there can be no amendment without consent, or Rule of Court upon Motion.

The Roll wherein the Declaration is entred with an Imparlance to it, is called the Imparlance Roll: the Roll of the next Term after, wherein the Declaration is again entred as before *Verbatim*, together with the Issue or Judgment to it; that second Roll is called the Issue or Judgment Roll; and if the first Roll, which is the Imparlance Roll, be right; and the second Roll, which is the Issue or Judgment Roll, be mistaken, the

the Imparlance Roll is the warrant to amend the Subsequent Roll: and if the Imparlance Roll be mistaken, and the Issue Roll both, yet if the Originall Writ be right, all the subsequent Writs and Rolls are amendable by the Original.

If the Defendant pleads a special Plea, he may wave it the same Term before it be entred, or any Replication made thereunto, and plead the general Issue; but if the Term be past, it is intended to be entred, and therefore cannot be altered or waved without consent or motion in Court: yet if in truth the Plea be not entred, but still

in Paper it may be amended
upon payment of Costs.

*Of Reading Demurrers, Special Verdicts, &c. in Court ;
and the course used therein by
the Prothonotaries.*

AFTER the Bar have been
once heard over, their
Records of Demurrers and Special Verdicts are read, and
Wagers of Law taken by the
Secondaries. In order, the first
Prothonotary begins first, and
then the second and third Pro-
thonotary in their courses ;
and

and untill the Books be delivered to the Judges, and the Record read, the matter in Law ought not to be spoke to, at the Barre..

Of the Chief Prothonotary.

THe chiefe Prothonotary swears all the Officers and Attornies of the Court, and enters the Admissions of Record for the Officers, and for the Attornies, he enters them in his Remembrance Roll, that they were, *Furati in Curia*, and makes

makes certificate thereof unto the Clerk of the Warrants, by which he enters the Attorney's name into the Roll.

The chief Prothonotary ought to enter all Patents made to the Justices or Officers of this Court, and other Patents of Grace by the King to the Court, and ought to have the first Plea Roll, and the first Common Roll of the Court, and to enter all Writs of Adjournment of the Terms.

Of

*Of the Teste's and Retorns of
Writs in all Actions real and
personal, and those brought by
Attachment of Priviledge, &c.*

There must be nine retorns
between the Teste, and the
retorn inclusive of all Writs of
Formidon, Writs of *Right*, *Ayel*,
&c. and in *Dower* five retorns,
and in all other Personal Acti-
ons fifteen dayes, except in
Actions brought by Attach-
ment of Priviledge which are
retornable, *de die in diem*: and
the like is, where the suit is by
Bill against a Priviledged Per-
son, in which cases, the Con-
tinuan-

tinuances are, *de die in diem*,
and alwaies upon a day cer-
tain, and not upon a common
Retorn.

*The antient course of giving
Warrants to confess Judge-
ments.*

THE Principal in a Bond
might formerly have gi-
ven Warrant to appear for
himself and his Sureties, and
to confess Judgment for all, and
it was Warranted by the course
of the Court: But if the Sure-
ty dyed, the Principal could
not

not confess Judgment against the Executor of the Surety, for then he should take away his Plea of *plene Administravit*: And so it was if the Principal dyed, his Executor could not confess Judgment against the Surety. But this Practice is quite altered, so that no Principal or other can give Warrant for any but himself onely.

*Of Renewing Judgments by
Scire facias.*

IF the Plaintiff in a Judgment dyes, his Executor must renew the Judgment by one *Scirec facias*; but otherwise it is where the Defendant dyes, there must be two Writs of *Scire faciat*; unless there be *Scire feci* returned by the Sheriff upon the first Writ of *Scire facias*, for one *Scire feci* doth amount to as much as two *Nichil's* returned.

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*Of Persons taken in Execution
in forrein Counties*

NO Defendant can be taken in Execution in a forrein County, untill there be first a Writ of *Capias ad Satisfaciendum*, sued forth in that County where the Action lies, and *Non est inventus* returned thereupon, and filed; or that there be an Execution in the Proper County entred upon the Roll, and a *Testatum* awarded.

*Concerning the Priviledge of the
Clerks of the Court.*

THe Clerks of the Court may resort to the Rolls of the Court, to examine their own Entries, and make them right, if there be no Writ of Error brought, nor Rule of Court, nor Recordatur entered to the contrary; in which case the Clerks hands are rendered useless, so as he cannot amend any thing in the Roll, without a Rule of the Court.

*Of carrying down Causes to be
tryed by Proviso.*

THe Plaintiff must make
one Default, in not car-
rying down the Record of
Nisi prius, before the Defen-
dant can take it down by
Proviso; except it be in *Re-
plevyn*, in which Action the
Defendant may take it down
the first time, and not stay
till the Plaintiff makes De-
fault.

Of

*Of giving notice upon Writs of
Inquiry, and Nisi prius.*

BY the antient course of the Court, the Plaintiff was not bound to give the Defendant notice of the speeding a Writ of *Inquiry* of Damages, but the Defendant, when there was a Judgment against him, then ought to have taken notice at his peril: But that Course is altered by Rule of Court, and now the Plaintiff must give the Defendant eight dayes notice.

The Plaintiff ought to give the Defendant or his Attorney

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ney notice of every Tryal by
Nisi prius, before it be Try-
 ed: But if the Record hath
 been once carried down, and
 notice given, then the Plain-
 tiff carrying it down the se-
 cond time (or if the Defen-
 dant carries it down by *Pro-
 viso*) there needs no notice.

of

*Of Declaring upon Reversal
of Utlaries, and Bayl to
Writs of Habeas corpus.*

IF the Plaintiff do not Declare within two Terms after the Utlary reversed, or Bayl put in upon a Removal by *Habeas corpus*, &c. the Defendant is not bound to accept the Declaration afterwards. But in such case, the Defendant cannot *Non prof.* the Plaintiff, and have costs for want of Declaring, because the Defendant was not Arrested upon a Common Writ.

Of

Of Appearing in Quare Impedit, and Wast upon the Distress.

IF the Defendant in *Quare Impedit*, or in a Writ of *Wast* do not appear upon the Distress, it is peremptory to him, and the Judgment shall be entred against him of course, without moving of the Court.

F

of

Of Arresting Judgment.

After a *Verdict* is given for
 the Plaintiff, there is four
 dayes from the retorn of the
Habeas Corpora allowed the
 Defendant, to make an Ar-
 rest of Judgment, unless the
Habeas Corpora be retorna-
 ble the last retorn of the Term:
 And in that case the Defen-
 dant hath day untill the last
 day of the Term, and no
 longer: And there is no
 Course of the Court that
 gives four dayes after the
 bringing in of the *Postea*, but
 after

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after the return of the *Habeas Corpora*.

Of Matters concerning the Prothonotaries ; and of the Clerks, and Attornies of this Court, and their Clyents.

EVERY *Attorney* of this Court when he is first sworn an *Attorney*, hath an Election to settle himself and his business in which of the three *Prothonotaries* Office he pleaseth; but after his Election once made, he must continue in that Office, and may

not remove from Office to Office, without the Licence of the Court, upon just cause shewed against that *Prothonotary*, from whose Office he would remove: And for the *Clerks*, they have an Election to be of which office they will, before they are admitted, but when they have made their Election, and are once admitted in an Office, they are concluded, and may not remove without leave of the Court.

So likewise, where a Cause is first begun, in that Office it must continue to the end of that Cause; As where the Declaration is entred, there the Issue and Judgment must be en-

entred; & the Execution or *Scire facias* upon that Judgment, must be in that Office where the Judgment is; and so it is for *Habeas Corpus* upon Bayles, the *Procedendo* must go out of the same Office from whence the *Habeas Corpus* went; and if there be a *Scire facias* upon the Bayl, it must be in the same Office where the Record of the Bayl is.

And likewise, every Clyent hath an Election to chuse what Attorney he pleaseth; but after he hath chosen an Attorney in a Cause, he cannot change him without leave of the Court, upon just cause shewed against him.

Of

Of Tryals at Barre.

FOR Tryals at the Barre, they are called in course; the chief *Prothonotary* hath the first turne, the second *Prothonotary* the second course, and the third *Prothonotary* the third course: And the same course (as hath been before observed) is for reading of Records of Demurrers, and special Verdicts, and the like for Wagers of Law, which are alwayes called upon the *Quarto die post*, after the Barre hath been once heard over.

Of

*Of Declaring in Causes Remo-
ved, aswel out of Inferiour
Courts, as otherwise.*

THe Plaintiff that Declares
upon a new Original,
where a Cause is removed out
of an Inferiour Court, must
not vary from his first Action,
in the Nature of his Action
in the County, or in the Sum
in demand; and this New O-
riginal must be brought with-
in two Terms after the Bayl
put in, accounting that Term
wherein the Bayl was taken,
for one.

If the Defendant be Arrest-
ed.

ed by *Capias* out of this Court,
 and afterwards removed by
Habeas Corpus, and committed
 to the *Fleet*, and charged with
 this *Capias*, the Plaintiff in that
Capias may by course of the
 Court declare against the
 Prisoner in *Custodia* upon the
Capias; and if the Defendant
 will not Plead, Judgment shall
 be entred by *Nichil dicit*.

Of an Habeas corpus.

THe *Habeas corpus* is the Warrant to bring the Prisoner to put in Bayl, and the Bayl must be taken upon the retorn of the Writ, or within some few dayes after, and in the same Term, and then shall be intended to be taken upon the retorn of the Writ; and therefore where the Writ is retornable upon a day certain, there the course is to put down no day for the taking of the Bayl; but where the Writ is retorn-
G
able,

able, immediate there must be a day of the *Caption*, which must be some day before the end of that Term next after *Teste* of the Writ.

Of Declaring upon Mesne Process.

BY the Common Practice of this Court now used, if the Defendant be Arrested upon *Mesne Process* in *London*, or any other County or City, the Plaintiff may declare against him in such County or City where he was Arrested,

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rested, or may lay his Action
 in any other County in *Eng-
 land* at the Plaintiffs Election:
 And the Defendant is bound
 to accept of as many Declarati-
 ons, by himself or his Attor-
 ney, in any Action whatsoe-
 ver at the same Plaintiffs suit,
 (real Actions only excepted)
 as the Plaintiff hath cause to
 declare against him; but the
 Defendant is only bound to
 put in Bayl to the first Action,
 (if the case so require) and
 only to appear to all such
 other Actions, as shall be
 brought against him by the
 same Plaintiff, as aforesaid, and
 to receive Declarations there-
 upon,

upon, without putting in Bayl
thereunto (except in the first
Action only, as aforesaid).

But note that the Defen-
dant is not bound by the Ru-
les, or Usage of this Court,
to accept of Declarations at a-
ny other persons suit, than the
Plaintiffs; at whose suit he is
Arrested, as the course is in
the Court of the *Kings Bench*;
for that there the Defendant
is supposed to be in *Custodia
Marrescalli*, and so to answer,
&c.

Of

Of Nonfuits.

UPon any Writ sued out of this Court retornable in any Term, the Plaintiff hath that Term wherein the Writ is retornable, and until the last day of the subsequent Term, to Declare against the Defendant, but not afterwards: And if he doth not then Declare, the Defendant upon a Rule given in that Office, where the Plaintiffs Atorney to the Writ enters, may there sign a *Non profedendum*, and take out Execution thereupon for his

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his Costs. And there is the
same time allowed the Plain-
tiff, to Declare in the *Kings*
Bench, otherwise the Defen-
dant may there have a *Non*
prosedendum.

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